United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-1517

In The

United States Court of Appeals

For The Second Circuit

*

Docket No. 74-1517

UNITED STATES OF AMERICA,

- against -

SALVATORE THOMAS BADALAMENTE

Appellant-Defendant.

PETITION FOR REHEARING BY APPELLANT
SALVATORE THOMAS BADALAMENTE

MICHAEL P. DIRENZO
Attorney for Appellant
15 Columbus Circle
New York, New York 10023
(212) 541-7740

H. ELLIOT WALES
of Counsel
747 Third Avenue
New York, New York 10017
(212) 421 1993

LEGALLY YOURS O. S. ENTERPRISES, LTD.
507 Fifth Avenue, Suite 605
New York, New York 10017
(212) 697-5675

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

SALVATORE BADALAMENTE,

Appellant-Defendant.

Docket #74-1517

PETITION FOR REHEARING BY APPELLANT
SALVATORE BADALAMENTE

The appellant Salvatore Badalamente petitions this Court for rehearing, with regard to the opinion and judgment of this Court, dated November 21, 1974, which affirmed the judgment of conviction of the District Court. Rule 40, Federal Rules of Appellate Procedure.

This is not a suggestion that the rehearing be done by the Court in banc. Rule 35, FRAP.

The panel of judges Winter, Mulligan and Newman affirmed the judgment of conviction of appellant Salvatore Badalamente, and simultaneously reversed the judgment of conviction of co-appellant Herbert Yagid. See slip opinion page 5899. We submit that for the very reasons that this Court decided Yagid was entitled to a reversal and a new trial,

Salvatore Badalamente is also entitled to the very same relief. Both Badalamente and Yagid were convicted by a jury ofconspiracy to transport in interstate and foreign commerce, a counterfeit savings bank passbook. In addition Yagid was convicted of the substantive offense of actual interstate transportation.

The conviction as to Yagid was reversed because of the failure of the prosecution to produce at the trial for use in impeachment by the defendants of letters that government witness (and co-defendant) Jerome Allen had written to the trial judge complaining of pressure imposed upon him by the office of the United States Attorney.

This panel held that the non-production of these letters was in violation of the Jencks Act (18 USC 3500) and the requirements of Brady v. Maryland (373 U.S. 83, 87.) This Court recognized that the Allen letters to Judge Carter, if called to the attention of the jury, could well have substantially limited or destroyed the credibility of Allen. In this regard this panel stated (pages 5907-5908):

> "We can only read the letter which we have quoted, and those which we have not set forth but which have an even more hysterical tenor, as suggesting, as Yagid's counsel so aptly characterizes, "that Allen was either under extreme pressure from the United States Attorney's office to testify, whether truthfully or not, or that he was either a liar or deranged." All of these, or various combinations, are possibilities. Significantly, any one would have a powerful adverse effect on Allen's credibility; and, as we

have shown, his credibility may well have been the determinative factor in the minds of the jury when it disbelieved Yagid's defense and found him guilty."

Of course the credibility of Allen was already subject to some limitation. He was a co-defendant in this case; he had pleaded guilty. Obviously by testifying for the gov ernment he was seeking some type of favorable consideration in sentencing and in the disposition of other legal problems which were facing him.

This Court has recognized that the government's case rested principally upon the testimony of Jerome Allen and Herbert Olsberg. In its opinion the panel recognized that the testimony of Olsberg was in substantial regards not corroborated, and that in toto his credibility was very much in dispute as he was in fact a paid informer. In this regard the Court wrote (page 5905):

"The importance of Allen's testimony is made greater by the fact that Olsberg, as a paid informer, was not the most credible witness in disputed, uncorroborated aspects of his testimony."

As such the government's case in toto to establish the existence of a conspiracy, and the participation of each of the three defendants on trial, depended completely on the testimony of both Olsberg and Allen. Both were very tainted witnesses, whose credibility was very much in dispute.

The government had little evidence of a non-tainted source, nor did it have any admissions, or confessions, or the fruits of a search and seizure to bolster the case.

While three co-defendants had pleaded guilty prior to trial, the jury had learned of the plea of guilty of only the defendant Allen, who had testified as a government witness.

We submit that this Court has overlooked and misapprehended the application of Allen's testimony as it pertained to the government's case against Badalamente, and erroneously brushed aside the Jencks Act point as it pertained to the effect of Allen's testimony in the government's case against Badalamente.

I remind this Court of what it said in holding the Jencks Act point not applicable as against Badalamente (page 5909; footnote 3):

> "The ground for reversing Yagid's conviction is inapplicable to Badalamente, because the record reflects the accuracy of his brief that Allen's testimony merely "confirmed the existence of the conspiracy and the participation of Yagid and Stern, but did not implicate Badalamente in any manner."
>
> *********
>
> "While Allen's testimony did confirm the existence of the conspiracy, the fact that a conspiracy existed was not a question about which there was any real dispute at the trial. The jury was told that Yagid, Badalamente and

> Stern were charged with conspiring with each other and four other named individuals, including Allen who testified at trial and admitted his guilt. In fact, Turi, Berardelli and Allen, three of the named co- conspirators, pleaded guilty before the trial of Yagid and Badalamente began. The testimony of Olsberg and others, excluding Allen, showed the existence of a conspiracy among all of the named co-conspirators. Indeed, Badalamente in his brief states that "the evidence abundantly demonstrated the existence of the conspiracy and the guilt of Yagid, Stern, Allen, Berardelli and Turi."
>
> At trial, the dispute as to Yagid was whether he had been entrapped by Olsberg into joining the conspiracy and, if so, whether, after becoming a member, he had withdrawn prior to the commission of the substantive crime. At trial, the dispute as to Badalamente was whether he had joined the conspiracy with knowledge of its illegal objectives rather than simply participated with Yagid, Stern and Olsberg in a perfectly legal real estate transaction as he claimed.
>
> Since we are persuaded that ther was no real possibility that the jury convicted Badalamente solely upon the finding that he conspired with Yagid alone, we conclude that the defect in Yagid's conviction does not require that Badalamente be given a new trial."

We must recall that in order for the government to prevail at the trial, it was necessary that they establish <u>both</u> the existence of a conspiracy <u>and</u> Badalamente's membership in that conspiracy. With regard to the first task - establishing the existence of a conspiracy - the government had both Olsberg and Allen as witnesses.

This Court has recognized that the credibility of both was in serious question. Obviously the credibility of Allen was <u>not</u> more substantially questioned at the trial because the government had deprived the defense of the Allen letters to Judge Carter. Allen's testimony was crucial to the government to bolster the testimony of Olsberg. While it is true

that only Olsberg implicated Badalamente, Allen's testimony assisted the government in making the argument to the jury that Olsberg was in fact a credible witness because in part he was corroborated by Allen. It takes little speculation to realize that the government's argument to the jury would have been substantially weakened if the credibility of Allen had been shown to be non-existent. In that regard Allen could not have been a persuasive factor in the government's argument that Olsberg was credible because he was in fact corroborated by Allen. The mathematics of the situation doesn't make one credible witness (or one credible case) out of two non-credible witnesses.

Counsel for Badalamente at the trial really did not concede that a conspiracy in fact existed. His argument really should be read that on the state of the evidence as it was presented to that jury, he chose not to put in substantial issue the question of the existence of the conspiracy, but instead focused on the issue of whether Badalamente was a member of that conspiracy. However, it doesn't follow that if the credibility of Allen had been more substantially questioned, or even destroyed, by the existence of the Allen letters to Judge Carter, that the defense could have persuasively argued to the jury that due to the lack of credibility of both Allen and Olsberg, the government never really established by credible evidence that a conspiracy in fact did exist. In addition counsel for Badalamente at the trial could well have argued that the credibility of

Olsberg was not in fact bolstered by the testimony of Allen, for the Allen letters showed very well that Allen simply was not a credible witness. As such we cannot say that the defense of Badalamente was not substantially prejudiced by the failure to have in its possession for cross-examination the Allen letters. We know well that the defense must make its argument to the jury based on the record as it develops at the trial. The present record made it difficult for Badalamente to argue to the jury that a conspiracy did not exist. As such he chose to concentrate on the single issue of his own membership. However, we cannot say with certainty that the defense would not have adopted a different strategy if they could have destroyed the credibility of Allen. Then Badalamente may well have argued to the jury that the government was lacking in credible evidence to establish the existence of a conspiracy.

In this regard we invite the attention of the panel to the opinion of this Court in United States v. Aaron, at 457 F2d, 865, 869 (CA-2, 1972) in which Judge Waterman wrote (at 869):

> "We need not attempt to weigh with mathematical precision whether the withholding from the defense of a particular pre-trial statement made by a government witness violated the defendant's right to the full information the Jencks Act grants him. We agree with Judge Sobeloff's approach in the Missler case, 414 F.2d supra at 1304, where he pointed out that "unless it is perfectly clear that the defense was not prejudiced by

> the omission, reversal is indicated." Moreover, it is of little significance to the defense in this case that the Government's failure to furnish was inadvertent. The prosecutor before turning the witness over to the cross-examiner knew of the existence of the second report and had an opportunity to relay that information to Aaron's counsel. This he did not do. We are convinced from a reading of the record that it is not perfectly clear that the defense was not prejudiced by the Government's failure."

Judge Carter had instructed the jury that in order for the government to prevail, the jury must find both the existence of a conspiracy and the membership of Badalamente. It is not unreasonable to believe that had this jury known the additional relevant facts regarding the credibility of Allen, this jury may well have not credited the government's presentation on the issue of the existence of a conspiracy.

Unfortunately this Court has seized upon several words in the brief of Badalamente's counsel in which counsel wrote "that Allen's testimony merely "confirmed the existence of the conspiracy and the participation of Yagid and Stern, but did not implicate Badalamente in any manner." Slip opinion page 5909. The choice of the word "confirmed" was unfortunate and far from accurate. Allen's testimony corroborated aspects of the testimony of Olsberg as to the existence of the conspiracy. However, the testimony of two witnesses, both of whose credibility is in serious doubt, cannot be said to "confirm" anything. Two witnesses can each corroborate the other, and yet both be testifying falsely. As even the testimony of the proverbial twenty bishops can be questioned,

certainly the testimony of the demons Olsberg and Allen can be challenged. As the jury did not know the full deficiencies in the credibility of Allen, we can really say that their verdict constitutes a genuine finding that both Allen and Olsberg were credible in finding the existence of a conspiracy. It is not fair to judge the defense of Badalamente solely by the arguments made by his counsel. Obviously counsel at both the trial and on the appeal had to face up to the impact of the testimony. How can we really say that the defense might not have put into issue the existence of the conspiracy if the testimony of Allen were shown to be totally devoid of credibility?

The government should not be allowed to profit by its own wrongdoings. By withholding the Allen letters, in effect the government forced Badalamente to adopt a certain strategy at the trial. The government's suppression of the Allen letters may well have contributed to Badalamente's decision not to contest too vigorously the evidence as it pertained to the existence of the conspiracy. As such the government's non-compliance with the requirements of the Jencks Act may well have lulled the defense into adopting one strategy whereas if the government had properly complied, the defense may well have adopted a different position.

The defense position on the appeal not to contest the sufficiency

of the evidence as it pertains to the issue of the existence of a conspiracy in no way credits the credibility of that testimony. Perjurious testimony can meet the test of sufficiency just as long as it pertains to each and every element of the statutory offense. Perjurious testimony of two witnesses can meet the test of sufficiency, but nevertheless remains perjurious. Obviously the Appellate Court cannot determine whether such testimony is perjurious. Only a jury has that competence, and that competence can be exercised only when the jury has learned of all of the evidence pertaining to the credibility of the witnesses, and not just some of the evidence.

CONCLUSION

As this case has to be retried any way, the request of Badalamente will not cause any undue problems of administration to the District Court. On the other hand it will have the solitary effect of enforcing the requirements of the Jencks Act. It is difficult to believe that after these many years, the government still does not face up to its full obligation under the requirements of this statute. Non-compliance can and usually does deprive the defense of making a full showing to the jury. A jury verdict can be an approved finding of the contested facts only when all evidence, not just some evidence, is presented to them for their consideration. It is not remote to argue that the government's case in toto may well have been found lacking in credibility by the jury, both as to the issue of the existence of the con-

spiracy and the issue of membership, if the jury knew that Allen was as deficient in credibility as the letters show him to be. If the jury were lacking in confidence in the total picture as presented by the government, it really makes little difference that only Olsberg's testimony implicates Badalamente.

MICHAEL P. Di RENZO
Counsel for Appellant Badalamente
15 Columbus Circle
New York, New York 10019
541-7740

ON THE BRIEF:

H. ELLIOT WALES
747 Third Avenue
New York, New York 10017
421-1993

CERTIFICATE OF GOOD FAITH

I, H. ELLIOT WALES, am a member of the bar of this Court.

I certify that this petiton for rehearing is made in good faith, and not for the purpose of delay. I am the principal author of this petition.

H. Elliot Wales

Dated: December 3, 1974